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Carol A. Corrigan

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## CALIFORNIA'S CRUELTY CRITERIA: EVALUATING SENTENCES AFTER *IN RE LYNCH*

The Constitutions of both the United States<sup>1</sup> and the state of California<sup>2</sup> prohibit the imposition of cruel and unusual punishments. Historically, the prohibition has been viewed as a ban on physical torture,<sup>3</sup> but the courts have long recognized that the concept is an evolving one which must be modified to comport with contemporary social standards.<sup>4</sup> Adopting the view of Mr. Justice Field's dissent in *O'Neil v. Vermont*,<sup>5</sup> the Supreme Court ruled in *Weems v. United States*<sup>6</sup> that a punishment might be cruel and unusual not only because of its method, but also because of its disproportionality to the offense for which it was imposed.<sup>7</sup> In so ruling the Court indicated that in addition to the nature of the punishment itself, the relationship between a crime and its prescribed penalty must be analyzed when applying Eighth Amendment standards.

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1. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The federal provision was made binding on the states under the Fourteenth Amendment in *Robinson v. California*, 370 U.S. 660, 667 (1962). See *Williams v. Field*, 416 F.2d 483, 486 (9th Cir. 1969); Annot., 33 A.L.R.3d 335, 351 (1970); Cuomo, *Mens Rea and Status Criminality*, 40 S. CAL. L. REV. 463, 475-76 n.64 (1967) [hereinafter cited as Cuomo]. It has been suggested that this application to the states was first made in 1947 by *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463, which held that an execution effected in a cruel and unusual manner would be prohibited under the Fourteenth Amendment. 59 J. CRIM. L.C. & P.S. 227, 228 n.9 (1968). In any case it is clear that the Eighth Amendment limitations are binding upon the states.

2. "All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed; nor shall cruel or unusual punishments be inflicted. Witnesses shall not be unreasonably detained, nor confined in any room where criminals are actually imprisoned." CAL. CONST. art. I, § 6.

3. See *O'Neil v. Vermont*, 144 U.S. 323, 337, 339 (1892) (dissenting opinion); *In re Kemmler*, 136 U.S. 436, 446-47 (1890); *Hobbs v. State*, 133 Ind. 404, 408-10, 32 N.E. 1019, 1021 (1893).

4. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *Goss v. Bomar*, 337 F.2d 341, 342-43 (6th Cir. 1964); *Jordan v. Fitzharris*, 257 F. Supp. 674, 679 (N.D. Cal. 1966); *Austin v. Harris*, 226 F. Supp. 304, 308 (W.D. Mo. 1964); *People v. Anderson*, 6 Cal. 3d 628, 640, 493 P.2d 880, 888, 100 Cal. Rptr. 152, 160 (1972); *People v. Clark*, 3 Cal. 3d 97, 99, 473 P.2d 997, 998, 89 Cal. Rptr. 253, 254 (1970).

5. 144 U.S. 323, 337 (1892).

6. 217 U.S. 349 (1910).

7. *Id.* at 368, 382.

In the recent opinion of *In re Lynch*,<sup>8</sup> the California Supreme Court has ruled for the first time that a punishment may violate article I section 6 of the state constitution if it is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity."<sup>9</sup> The ruling has thus interpreted the state constitutional proscription against excessive punishments in the same fashion in which the *Weems* Court construed the federal cruel and unusual provision.

This note will attempt to outline for the practitioner the avenues of sentence challenge opened by the *Lynch* decision. It examines the points upon which the opinion was based, the criteria it establishes for evaluating sentences, and the types of penalties which other jurisdictions have overturned. In addition, three related areas which might be considered in planning an appeal will be discussed: the prerogative of the courts to review legislative determinations regarding sentence length, judicial receptivity to the argument that some acts related to drug and alcohol addiction are merely aspects of a status which cannot be made criminal, and the impact of the *Lynch* decision on habitual criminal statutes.

### In re Lynch

John Lynch was convicted in 1958 of misdemeanor indecent exposure and was given a sentence of two years probation. Several years later he was again arrested for indecent exposure based upon the following facts. Between midnight and 1:00 a.m. Lynch entered a drive-in restaurant and ordered a cup of coffee. When the waitress brought him a second cup he inquired what time the restaurant closed and asked her to bring him periodic refills. The court summarized the rest of the incident as follows:

[A]bout half an hour later and without being called, the waitress approached petitioner's car with another cup of coffee. A siren happened to be sounding in the street at that moment, and petitioner was looking in its direction, away from the waitress. As she stood by his window she saw the fly of his pants open, his hand on his erect penis, and a "pin-up" magazine open on the front seat next to him. When petitioner heard her put the coffee down on his tray he turned, saw her, and said "Oops." The waitress left immediately. Some 15 minutes later, however, she assertedly observed him from a distance through a rearview mirror on his car and

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8. 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972), noted in 61 CALIF. L. REV. 418 (1973), and in 6 LOYOLA L. REV. 416 (Los Angeles) (1973).

9. 8 Cal. 3d at 424, 503 P.2d at 930, 105 Cal. Rptr. at 226. The court thereby disapproved an arguably contrary dictum contained in *In re Garner*, 179 Cal. 409, 415, 177 P. 162, 165 (1918). For an extensive discussion of other jurisdictions which have held similarly to *Lynch*, see Annot., 33 A.L.R.3d 335 (1970).

saw he was still exposed. The incident was then reported to the police, and petitioner was placed under arrest.<sup>10</sup>

Lynch was convicted of indecent exposure<sup>11</sup> and, as a second offender was guilty of a felony<sup>12</sup> and sentenced to prison for an indeterminate term. As a result, he spent more than five years in state penal facilities including three and one-half years in the state's maximum security enclosure at Folsom. He was denied parole four times and the Adult Authority declined to set his sentence at any term less than life.

### The Indeterminate Sentence Law

Lynch argued that the indeterminate sentence he was given was cruel and unusual. The court carefully noted that the petitioner had not challenged the system of indeterminate sentencing per se but had only asserted the unconstitutionality of his own sentence for indecent exposure.<sup>13</sup> Under the California sentencing system the trial court does not fix the length of incarceration following a conviction;<sup>14</sup> rather it sentences the defendant for the term prescribed by law, which consists of a minimum and maximum set by the legislature for each specific crime. Thereafter, the Adult Authority, which is characterized as an administrative agency within the Department of Corrections, actually determines the sentence the individual convict must serve.<sup>15</sup>

As a basis for its opinion accepting Lynch's contention, the court first noted that for the purposes of constitutional challenge an indeterminate sentence is in effect a sentence for the maximum term<sup>16</sup> and

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10. *In re Lynch*, 8 Cal. 3d 410, 438, 503 P.2d 921, 940, 105 Cal. Rptr. 217, 236 (1973).

11. For an extended discussion of what behavior constitutes indecent exposure see Note, *California Penal Code Section 314(1): Nudeness or Lewdness?*, 24 HASTINGS L.J. 1327 (1973).

12. Section 314 of the California Penal Code (West 1970) states in part: "Every person who willfully and lewdly . . .

"Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby . . . is guilty of a misdemeanor.

"Upon the second and each subsequent conviction under subdivision 1 of this section . . . every person so convicted is guilty of a felony, and is punishable by imprisonment in state prison for not less than one year."

13. *In re Lynch*, 8 Cal. 3d at 415, 503 P.2d at 923-24, 105 Cal. Rptr. at 219-20.

14. See CAL. PEN. CODE § 1168 (West 1970).

15. See *People v. Kostal*, 159 Cal. App. 2d 444, 453, 323 P.2d 1020, 1026 (1958); CAL. PEN. CODE §§ 5001, 5077 (West 1970); 2 B. WITKIN, CALIFORNIA CRIMES § 988, at 941 (1963).

16. 8 Cal. 3d at 415-19, 503 P.2d at 923-26, 105 Cal. Rptr. at 219-22; *accord*, *In re Mills*, 55 Cal. 2d 646, 653, 361 P.2d 15, 20, 12 Cal. Rptr. 483, 488 (1961); *In*

that under Penal Code section 671<sup>17</sup> the maximum sentence for second-offense indecent exposure is life imprisonment.<sup>18</sup> Having thus determined the length of sentence, the court ruled that a life sentence for second-offense indecent exposure was so disproportionate to the crime as to constitute cruel and unusual punishment and, therefore, that "the recidivist provision of section 314 is void under article I, section 6, of the California Constitution."<sup>19</sup> The court then granted Lynch's petition for a writ of habeas corpus.<sup>20</sup>

### Challenging a Sentence as Disproportionate

The antipathy for cruel and unusual punishments is one of long standing in the common law. The concept can be found in the Magna Carta,<sup>21</sup> and some contend is as old as the laws of Edward the

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*re Lee*, 177 Cal. 690, 693, 171 P. 958, 959 (1918); *People v. Wade*, 266 Cal. App. 2d 918, 928, 72 Cal. Rptr. 538, 544 (1968); 2 B. WITKIN, CALIFORNIA CRIMES § 991, at 944 (1963).

17. California Penal Code section 671 (West 1970) states: "Whenever any person is declared punishable for a crime by imprisonment in the state prison for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, punishment of such offender shall be imprisonment during his natural life subject to the provisions of Part 3 of this code."

18. It was noted, however, that for other purposes an indeterminate sentence with a life maximum should not be considered a life sentence. 8 Cal. 3d at 419-20 n.10, 503 P.2d at 927 n.10, 105 Cal. Rptr. at 223 n.10. See, e.g., *In re Quinn*, 25 Cal. 2d 799, 154 P.2d 875 (1945) (trial court's power to order consecutive sentences); *People v. Ralph*, 24 Cal. 2d 575, 150 P.2d 401 (1944) (eligibility for commitment to Youth Authority); *People v. Shaw*, 237 Cal. App. 2d 606, 47 Cal. Rptr. 96 (1965) (right to additional peremptory challenges).

19. 8 Cal. 3d at 439, 503 P.2d at 940, 105 Cal. Rptr. at 236. How this ruling will be construed by later courts is still questionable as two recent decisions indicate. In *Leaming v. Municipal Court*, 32 Cal. App. 3d 847, 108 Cal. Rptr. 578 (1973), *appeal docketed*, No. S.F. 23038, Aug. 16, 1973, the court ruled that *Lynch* struck down only the penalty portion of the statute but left intact the provision making a second offense felonious. Under this reading the court maintained that, absent a specific statutory penalty, section 18 of the California Penal Code (West 1970) comes into play and the penalty is set at no more than five years. See note 20 *infra*. A contrary position was taken by the court in *People v. Walsh*, 32 Cal. App. 3d 463, 108 Cal. Rptr. 115 (1973), *appeal docketed*, No. Crim. 18052, July 12, 1973, which ruled that *Lynch* set aside the entire paragraph dealing with recidivism and that until and unless the legislature acts, indecent exposure, regardless of the number of repetitions must be prosecuted as a misdemeanor. 32 Cal. App. 3d at 466, 108 Cal. Rptr. at 236-37.

20. The writ was granted on the rationale that the section prescribing the punishment was declared invalid and thus the felony became one for which no provision is made for punishment. Under California Penal Code section 18 (West 1970) such a felony is punishable by no more than five years. Petitioner had already served more than five years and was, therefore, entitled to release. 8 Cal. 3d at 439, 503 P.2d at 940-41, 105 Cal. Rptr. at 236-37.

21. "A freeman shall not be amerced [punished] for a small fault, but after the manner of the fault, and for a great fault, after the greatness thereof, saving to him his [contenement] [countenance] . . ." 4 Halsbury Stats. of Eng. 24 (2d ed. 1948).

Confessor.<sup>22</sup> The phrase was included in the English Bill of Rights in 1689<sup>23</sup> as well as in the Virginia Declaration of Rights in 1776,<sup>24</sup> and, finally it was incorporated in the Eighth Amendment to the United States Constitution.<sup>25</sup>

The interpretation that disproportionate sentences are cruel and unusual even though not barbarous in their method is of more recent origin. As noted earlier, the United States Supreme Court first adopted this position in the *Weems* decision. In that case a sentence given by a Philippine court was ruled excessive on the basis that the penalty was greater than punishments given in the Philippines or the United States for more serious crimes and was greater than the sentence given under United States federal law for the same offense. Having taken two steps forward, the Court then retreated somewhat in 1916 when Mr. Justice Holmes, who had dissented in *Weems*, wrote the opinion for a unanimous Court in *Badders v. United States*. In that opinion he indirectly repudiated the comparative standard for evaluating excessiveness<sup>26</sup> which the court had adopted only six years before. In so doing Holmes did not undermine the main principle of *Weems* which expanded the scope of the injunction against cruel and unusual punishment, but his opinion broke the crucible in which that principle was tested.<sup>27</sup> Thus, as recently as 1961, one writer noted:

The theoretical importance of the *Weems* decision has not been matched by its practical application.

. . . .

[T]he courts have been largely unwilling to second-guess the legislature as to what is an adequate penalty for any particular offense. Therefore, although the prohibition in theory serves to prevent disproportionate punishments, it is a rare defendant who can get relief by means of a claim of this nature. The principle, however, is there, awaiting broadened use in the future.<sup>28</sup>

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22. See 34 MINN. L. REV. 134, 135 (1950).

23. R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791, 9 (1955) [hereinafter cited as RUTLAND].

24. *Id.* at 38-39.

25. Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U.L. REV. 846 (1961) [hereinafter cited as *The Effectiveness of the Eighth Amendment*].

26. In *Badders*, 240 U.S. 391, 394 (1916), Holmes cited as authoritative a pre-*Weems* decision which contained the following language: "That for other offenses, which may be considered by most, if not all, of a more grievous character, less punishments have been inflicted, does not make this sentence cruel." *Howard v. Fleming*, 191 U.S. 126, 135-36 (1903).

27. See Note, *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996, 1008-09 (1964).

28. *The Effectiveness of the Eighth Amendment*, *supra* note 25, at 848-49 (citations omitted).

The problem, then, was that after *Badders* courts were left without criteria for evaluating sentences as to their disproportionality and, lacking an accepted test on which to base their opinions, were loath to overturn sentences on this ground. This deficiency has been rectified in California by the *Lynch* decision in which the court specifically set down three major touchstones for evaluating sentences: the nature of the offense, penalties imposed in the same jurisdiction for more serious offenses, and sentences given for the same crime in other jurisdictions. The next two sections will examine how other courts have applied these standards.

### *The Nature of the Offense*

In analyzing the crime itself the *Lynch* court first looked to the "triviality" of the offense. When analyzing penalties from this perspective *malum prohibitum* infractions such as selling liquor in a "dry" state,<sup>29</sup> picking flowers in a park,<sup>30</sup> or refusing to vacate a home pursuant to an eminent domain order<sup>31</sup> are particularly vulnerable. However, *malum in se* offenses, when considered in terms of the lack of violence they may entail, may also be relatively trivial, particularly when compared with the punishments meted out for them. In *Weems*, for example, the Court felt that a penalty of fifteen years of hard and painful labor, constant ensnarement, and a variety of other penalties including lifelong surveillance and civil interdiction was inappropriate for the embezzlement of a few hundred pesos.<sup>32</sup> Stressing the nonviolent aspect of the infraction, the Michigan Supreme Court struck down a twenty year sentence for the sale of marijuana<sup>33</sup> and the New Jersey high court held a two to three year sentence for possession of the drug to be excessive.<sup>34</sup>

Justice Mosk, speaking for the court in *Lynch*, referred to several cases which indicate that even more serious crimes must still bear some proportionality to the resulting sentences.<sup>35</sup> He cited *Faulkner v. State*,<sup>36</sup> for example, which struck down a sentence of thirty-six years for the utterance of eight bad checks, all of which were written in a single day. There the court explained: "The offense is not of sufficient gravity to justify imposing what amounts to a life sentence on appellant."<sup>37</sup>

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29. See *O'Neil v. Vermont*, 144 U.S. 323, 337, 339 (1892) (dissenting opinion).

30. See *State ex rel. Garvey v. Whitaker*, 48 La. Ann. 527, 19 So. 457 (1896).

31. See *State ex rel. Chappuis v. Marmouget*, 104 La. 1, 28 So. 920 (1900).

32. See 217 U.S. 349 (1910).

33. See *People v. Lorentzen*, 387 Mich. 167, 194 N.W.2d 827 (1972).

34. See *State v. Ward*, 57 N.J. 75, 270 A.2d 1 (1970).

35. See 8 Cal. 3d at 420-23, 503 P.2d at 927-30, 105 Cal. Rptr. at 223-26.

36. 445 P.2d 815 (Alas. 1968).

37. *Id.* at 818-19.

It should be noted that sentences need not be lengthy to come under judicial scrutiny since relatively short sentences have also been struck down when adjudged disproportionate. In 1951 a Georgia court, for example, declared cruel and unusual a fine of \$4,760 or a term of 476 days for 238 counts of contempt of court in violation of a child custody ruling.<sup>38</sup> The Florida Supreme Court, in 1942, voided as excessive a three year penalty for concealing one gallon of moonshine whiskey to defraud the state of the taxes thereon.<sup>39</sup> More recently, Mr. Justice Stewart, speaking for the majority in *Robinson v. California*, wrote:

[T]o be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.<sup>40</sup>

Nor is the disproportionality argument limited to nonviolent crimes or to crimes which might be considered trivial. In *Ralph v. Warden*,<sup>41</sup> the appellant successfully argued that a capital sentence was disproportionate in the case of his rape conviction since he neither killed his victim nor put her life in danger. The Oregon Supreme Court ruled that a life sentence for attempted rape is unconstitutionally disproportionate when the penalty for rape is only twenty years.<sup>42</sup> And in 1968 the high court of Indiana voided a twenty-five year maximum for robbery as disproportionate to a milder sentence for armed robbery.<sup>43</sup> It should be noted here that the Oregon and Indiana courts used the technique of comparing sentences with those given for more serious crimes, a method which the *Lynch* court would later adopt as one of its evaluational standards.

### *Comparing Punishments Within and Among Jurisdictions*

The *Lynch* decision indicated that when evaluating the proportionality of a sentence it is expedient to compare the penalty both

38. *Kenimer v. State*, 83 Ga. App. 264, 63 S.E.2d 280 (1951); *accord*, *State ex rel. Garvey v. Whitaker*, 48 La. Ann. 527, 19 So. 457 (1896) (\$720 or 2,160 days for seventy-two violations of picking flowers in the park); *State v. Ward*, 57 N.J. 75, 270 A.2d 1 (1970) (two to three years for possession of marijuana); *State v. Driver*, 78 N.C. 423 (1878) (five years in a county jail for wife beating).

39. *Nowling v. State*, 15 Fla. 584, 10 So. 2d 130 (1942).

40. 370 U.S. 660, 667 (1962).

41. 438 F.2d 786 (4th Cir. 1970).

42. *In re Cannon*, 203 Ore. 629, 281 P.2d 233 (1955).

43. *Dembowski v. State*, 251 Ind. 250, 240 N.E.2d 815 (1968); *accord*, *Willoughby v. Phend*, 301 F. Supp. 644 (N.D. Ind. 1969); *cf.* *State v. Ross*, 55 Ore. 450, 104 P. 596 (1909) (overturning a 790-year sentence for embezzlement of \$288,426); *State v. Kimbrough*, 212 S.C. 348, 46 S.E.2d 273 (1948) (voiding as excessive thirty years at hard labor for burglary).



with that given in the same jurisdiction for more serious offenses and with the punishment imposed by other jurisdictions for similar crimes. While these techniques are logically appealing, they have not been universally advocated. As noted above, Mr. Justice Holmes disapproved of this approach<sup>44</sup> and more recently the Court has ruled that the Constitution does not *require* that sentences meet a comparative test.<sup>45</sup> Nevertheless, the *Lynch* court accepts the assumptions upon which the methods are based and cites a number of other courts which agree.<sup>46</sup> The techniques are similar but their basal principles are somewhat divergent and so will be considered separately.

The comparison of a sentence with those imposed for more serious offenses is based on the idea that crimes can be classified in the order of their improbity and that the legislature generally imposes a penalty consistent with the gravity of the offense. On occasion, however, the legislature may become overly zealous in punishing a specific infraction either in response to public pressure or in an effort to deal with a crime that seems particularly disruptive of societal tranquility. If such legislative intemperance should occur the argument has been advanced that the great body of sentences serves as a guide against which hasty or excessive penalties may be evaluated.<sup>47</sup> The court referred to Mr. Justice Field's dissent in *O'Neil*<sup>48</sup> as an early reliance on this technique and notes that, "opinions are replete with examples of its use."<sup>49</sup> Since the *Lynch* court has encouraged the use of this test it should be noted that the present California Penal Code contains a number of penalties which are inconsistent in their severity.<sup>50</sup> If a sentence is to be ruled invalid because it is disproportion-

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44. See note 26 and accompanying text *supra*.

45. "[T]he Due Process Clause of the Fourteenth Amendment does not, nor does anything in the Constitution, require a state to fix or impose any particular penalty for any crime it may define or to impose the same or 'proportionate' sentences for separate and independent crimes." *Williams v. Oklahoma*, 358 U.S. 576, 586 (1959).

46. 8 Cal. 3d at 425-28, 503 P.2d 930-33, 105 Cal. Rptr. 226-229.

47. 8 Cal. 3d at 426, 503 P.2d at 931-32, 105 Cal. Rptr. at 227-28.

48. "Had [the defendant] been found guilty of burglary or highway robbery, he would have received less punishment than for the offenses of which he was convicted. It was six times as great as any court in Vermont could have imposed for manslaughter, forgery or perjury." *O'Neil v. Vermont*, 144 U.S. 323, 339 (1892).

49. 8 Cal. 3d at 426-28 & n.16, 503 P.2d at 932-33 & n.16, 105 Cal. Rptr. at 228-29 & n.16, *citing* *Weems v. United States*, 217 U.S. 349 (1910); *State v. Evans*, 73 Idaho 50, 245 P.2d 788 (1952); *Dembowski v. State*, 251 Ind. 250, 240 N.E.2d 815 (1968); *People v. Lorentzen*, 387 Mich. 167, 194 N.W.2d 827 (1972); *State v. Driver*, 78 N.C. 423 (1878); and *In re Cannon*, 203 Ore. 629, 281 P.2d 233 (1955).

50. If a man abducts a woman and compels her to marry him against her will he risks a sentence of two to fourteen years. CAL. PEN. CODE § 265 (West 1970). If instead he abducts her to live in an illicit relationship the penalty is only two or four years. *Id.* § 266b. One who assaults another with the intent to commit rape, robbery, sodomy, mayhem, or grand larceny is liable to a one to twenty year sentence

ate when compared to penalties assigned for other crimes, a substantial revamping of the Penal Code seems necessary. In this regard the Legislature established a committee in 1963 to revise the code.<sup>51</sup> The group's proposal called for a complete redrafting of the law which would, *inter alia*, impose a degree of internal consistency upon the state's criminal sentences. The proposal was recently passed by the Senate and is currently under consideration by the Assembly.<sup>52</sup> Until this or some other revision is adopted it appears that many penalties are ripe for appellate review.

The technique of referring to sentences in other jurisdictions appears to rest on the premise that other legislatures will have established penalties which are constitutionally sound<sup>53</sup> and, presumably, that other lawmakers may not have been influenced by the public ardor that brought about the allegedly Draconian sentence in question.<sup>54</sup> If these suppositions are valid, the court argues, the sentences

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(*id.* § 220), but if the assault is made with the intent to murder it merits only one to fourteen years. *Id.* § 217. The administration of a stupefying drug to assist in any felony incurs only a five year maximum term. *Id.* §§ 18, 222.

"Under the California Penal Code each offense has its own particular sentence. As a result of this practice the Legislature has, in the one hundred years since the passage of the Penal Code, enacted approximately forty-five different maximum prison terms for felony offenders. The result of this piece-meal process is a lack of uniformity in the sentencing structure. For example, . . . a boy who broke into a passenger car to steal the contents of the glove compartment subjected himself to a maximum term of fifteen years. If he stole the entire car, he could have only been sentenced to a maximum of ten years. Attempted train wrecking with intent to derail a train is a felony with a term of life, and no possibility of parole. Train wrecking without bodily injury has a maximum term of life and if bodily injury occurs, the offender can be sent to the gas chamber. However, if the offender hurls an object at a vehicle with the intent to wreck the vehicle and bodily harm results, he may be sentenced to a maximum of fourteen years. If the same individual shoots a missile or hard object at a train or bus, he can be sent to the county jail for one year or a state prison for no more than three years." Note, *Sentencing Under the Proposed California Criminal Code*, 19 U.C.L.A.L. REV. 526, 527-28 (1972) (citations omitted).

51. Cal. Stat. 1963, ch. 1797, at 3626.

52. S.B. 39 (1973), as amended Jan. 21, 1974.

53. See *In re Lynch*, 8 Cal. 3d 410, 427, 503 P.2d 921, 932, 105 Cal. Rptr. 217, 228 (1972).

54. It might be argued that the very role of the Legislature is to respond to public pressure and that if public sentiment favors harsh sentences for a particular offense the law should reflect that sentiment. While this position may be true in the abstract, in reality sentences often indicate only a passing public outcry over a crime, and penalties set at one time may diverge widely from those formulated at a later date. For example, an 1891 statute punishes attempted train wrecking by life imprisonment without possibility of parole. CAL. PEN. CODE § 218 (West 1970). In comparison, a 1949 law makes tampering with an aircraft so as to make it unsafe for flight punishable by no more than five years in prison and/or a \$5000 fine. *Id.* § 625b.

Another factor to be considered is that, while the public and its representatives are free to set the penalties they deem appropriate, they are always limited by the restric-

imposed in other jurisdictions do provide an illuminating reference point. In applying this test in *Lynch*, the court found that besides California only Michigan<sup>55</sup> and Oklahoma<sup>56</sup> impose a life sentence for a second offence of exhibitionism, and further that most states treat indecent exposure as a simple misdemeanor and do not increase the penalty upon recidivism.<sup>57</sup> Justice Mosk cites a number of decisions in which the method was used<sup>58</sup> and recently the California Supreme Court has referred to this comparison technique in its decision against capital punishment.<sup>59</sup>

### Other Considerations

*Lynch* has specifically delineated three criteria for challenging sentences as excessive. In addition there are three collateral areas in which *Lynch* might have some impact: the extent to which courts may review sentences established by the legislature, the advisability of relying on a status offense argument in challenging sentences given for crimes related to alcohol and drug addiction, and the legitimacy of habitual criminal provisions. This discussion is included to give the practitioner some idea as to how the *Lynch* principles may be extended to support other appellate arguments.

### Judicial Modification of Legislated Sentences

The *Lynch* court indicated that in evaluating a sentence it is appropriate to consider "the nature of the offense and/or the offender,"<sup>60</sup> and the opinion discusses the defendant as both a typical member of

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tions in the Constitution. Indeed, one of the very reasons for the constitutional restraints is to protect individuals from policies advocated by a hostile majority. As will be discussed below, see note 118 and accompanying text *infra*, the court steps in not to usurp the power of the legislature but to ensure that its authority is constitutionally exercised. See *In re Lynch*, 8 Cal. 3d 410, 414, 423-24, 503 P.2d 921, 923, 937-38, 105 Cal. Rptr. 217, 219, 234-35 (1972).

55. See MICH. COMP. LAWS ANN. §§ 750.10A, 750.335A (1968).

56. See OKLA. STAT. ANN. tit. 21, §§ 51, 62, 1021 (1958 & Supp. 1972).

57. 8 Cal. 3d at 436, 503 P.2d at 938-39, 105 Cal. Rptr. at 234-35.

58. 8 Cal. 3d at 427-28, 503 P.2d at 932-33, 105 Cal. Rptr. 228-29, *citing* *Trop v. Dulles*, 356 U.S. 86, 102 (1958); *Weems v. United States*, 217 U.S. 349, 380 (1910); *Ralph v. Warden*, 438 F.2d 786, 791-92 (4th Cir. 1970); *State v. Evans*, 73 Idaho 50, 58-59 n.1, 245 P.2d 778, 792-93 n.1 (1952); and *People v. Lorentzen*, 387 Mich. 167, 194 N.W.2d 827 (1972).

59. "If any doubt remained as to its cruelty, however, we could no longer uphold capital punishment on the ground that it is commonly accepted, for [there] is a world wide trend towards abolition.

... It is now, literally, an unusual punishment among civilized nations." *People v. Anderson*, 6 Cal. 3d 628, 654-56, 493 P.2d 880, 898-99, 100 Cal. Rptr. 152, 170-71 (1972).

60. 8 Cal. 3d at 425, 503 P.2d at 930, 105 Cal. Rptr. at 226.

a class<sup>61</sup> and as an individual.<sup>62</sup> Thus a petition for a writ of habeas corpus may take one of two approaches. It could be argued that a sentence is invalid either because the law under which it was imposed is unconstitutional or because the sentence as applied to the present appellant is inappropriate. There is a subtle difference involved here which has substantial constitutional ramifications since it raises the issue of a separation of powers between the courts and the legislature. The distinction lies in whether a court when overturning a punishment declares the statute itself unconstitutional or only prohibits the imposition of a valid penalty because of some particular characteristics of the offender or some specific circumstances incident to his criminal behavior. In other words the distinction is between a ruling that the statutory penalty is excessive when applied to *any* transgressor, and a holding that the law as written is generally acceptable but that it would be excessive if applied to a particular defendant.<sup>63</sup> The more widely held view is that if the law is not declared unconstitutional on its face, a defendant may not argue that he has received an unduly harsh sentence within the limits of that valid statute.<sup>64</sup> This position rests on the analysis that the legislative branch is to determine what acts shall be criminal and what punishments they shall merit while the courts may only intervene when the law itself is unconstitutional. If the legislature has overreached its authority then the judiciary can and must restrain it, but if the statute is found to be constitutional the courts must defer to the legislative determination.<sup>65</sup>

Although the position is strictly a minority one, there is some authority to the contrary. At the state level several jurisdictions<sup>66</sup> are

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61. *Id.* at 430-31, 503 P.2d at 934-35, 105 Cal. Rptr. at 230-31.

62. *Id.* at 437-38, 503 P.2d at 939-40, 105 Cal. Rptr. at 235-36.

63. It might be asserted that in a state like California which has an indeterminate sentence system, the courts should not encroach upon the Adult Authority's responsibility to tailor the punishment to the particular criminal. But the court is not concerned with the individuation of penalties. Rather it deals with the threshold question of whether the punishment given by statute, and under which the Adult Authority acquires its power over the convict, is valid. The counter argument contends that the court, although it may not order that Convict A be given 10 years, may rule that to sentence Convict A to 50 years as a statute provides is excessive in Convict A's case. This latter view has only been adopted by a minority of jurisdictions. See notes 66-78 and accompanying text *infra*.

64. *Brown v. State*, 152 Fla. 853, 13 So. 2d 458 (1943). Annot., 33 A.L.R.3d 335, 359-63 (1970), cites over 80 cases from the United States Supreme Court, federal and state jurisdictions which follow this majority view.

65. "Reasonable men may regard the statute as unduly harsh and therefore unwise; if they do, they should address their doubts to the Legislature. It is not for the courts to nullify a statute merely because it is unwise." *People v. Knowles*, 35 Cal. 2d 175, 180, 217 P.2d 1, 3 (1950); *accord*, *People v. Olson*, 173 Cal. App. 2d 535, 343 P.2d 379 (1959).

66. *Cox v. State*, 203 Ind. 544, 181 N.E. 469 (1932); *Workman v. Common-*

aligned with the opinion of Judge Diamond:

I would adopt what appears to be the minority view . . . . I recognize the fact that ordinarily a sentence within statutory limits should not be disturbed. But I also believe that it is conceivable that in extraordinary circumstances a sentence, although within the limits prescribed by law, may be so "disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice," and thus would amount to cruel and unusual punishment.<sup>67</sup>

There is some authority for this view at the federal level as well. The Tenth Circuit has ruled that "[i]f the sentence is within the statutory limit, appellate courts will not interfere *unless [it is] clearly cruel and unusual.*"<sup>68</sup> The same court later explained: "This court has used language which might indicate that appellate courts have power to interfere if a sentence is clearly cruel and unusual, but it has never done so."<sup>69</sup> In *Ralph v. Warden*,<sup>70</sup> the Fourth Circuit ruled that a death penalty for rape is not always unconstitutional but that it may be totally disproportionate when the "victim's life is neither taken nor endangered . . . ." <sup>71</sup> Thus the court indicated that a generally acceptable punishment for rape may cease to be so when particular circumstances are considered. A Ninth Circuit court, recognizing disproportionality as a form of cruel and unusual punishment, has ruled: "*Ordinarily, however, where the sentence imposed is within the limits prescribed by the statute for the offense committed, it will not be regarded as cruel and unusual.*"<sup>72</sup> Thus, although courts are reticent to overturn individual sentences, there are dicta in both state and federal opinions which indicate the possibility of doing so rather than invalidating the law.<sup>73</sup>

Although *Lynch* did consider the constitutionality of the indecent exposure statute both on its face and as applied to the particular defendant, the court did not specifically address itself to the separation of powers problem involved in voiding an individual sentence. How-

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wealth, 429 S.W.2d 374 (Ky. Ct. App. 1968); *Barber v. Gladden*, 210 Ore. 46, 309 P.2d 192 (1957); *State v. Ross*, 55 Ore. 450, 104 P. 596 (1909); *State v. Pratt*, 36 Wis. 2d 312, 153 N.W.2d 18 (1967).

67. *Faulkner v. State*, 445 P.2d 815, 818 (Alas. 1968) (citations omitted).

68. *Hayes v. United States*, 238 F.2d 318, 322 (10th Cir. 1956) (emphasis added).

69. *Smith v. United States*, 273 F.2d 462, 468 (10th Cir. 1959). The fact that the court had never done so should be viewed in light of the fact that courts were loathe to apply the cruel and unusual test since no accepted standards had yet been enunciated. See notes 28-29 and accompanying text *supra*.

70. 438 F.2d 786 (4th Cir. 1970).

71. *Id.* at 793.

72. *Black v. United States*, 269 F.2d 38, 43 (9th Cir. 1959) (emphasis added); *accord*, *Perkins v. State*, 234 F. Supp. 333, 337 (W.D.N.C. 1964).

73. *The Effectiveness of the Eighth Amendment*, *supra* note 25, at 852-54.

ever, inferences from the opinion, as well as those from other decisions, indicate that California courts align themselves with the majority on this issue.<sup>74</sup> In a general discussion of the separation of powers doctrine the court stated that it is for the legislature to make determinations of this kind and for the courts to supervise those determinations. In so doing the *Lynch* court did consider the character of the individual offender and the circumstances of his particular offense<sup>75</sup> but it did so only to indicate that the law, as written, is vulnerable to unjust application.<sup>76</sup> There are a few California cases<sup>77</sup> which utilize the open-ended language of the federal courts and thus do not completely rule out the possibility of overturning a particular sentence, but the majority of California courts have held to the contrary.<sup>78</sup> It appears that California courts generally are unwilling to upset the balance of power, or at least have been reticent to do so in the past, and that the challenge to a sentence is on much stronger ground if it attacks the law under which the penalty was imposed.

### Legitimate Penal Aims

Since *Lynch* has established that penalties must be in proportion to offenses, one might carry the reasoning one step further and argue

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74. Two recent cases have cited *Lynch* as authority for judicial deference to legislative action in the area of sentencing. *People v. Vienne*, 30 Cal. App. 3d 266, 273, 105 Cal. Rptr. 584, 588 (1973); *County of Orange v. Heim*, 30 Cal. App. 3d 694, 727, 106 Cal. Rptr. 825, 852 (1973).

75. The court quotes the remarks of the trial judge at the conclusion of the case: "Mr. Lynch, before you leave, let me say to you in the utmost sincerity, it has been my impression from the very outset of this case that you are a man of great potential. You are a person of unusual appearance, you make a very pleasant appearance, obviously [sic] have the capacity to get along well with people, you are obviously a person of superior intellect." 8 Cal. 3d at 437, 503 P.2d at 939, 105 Cal. Rptr. at 235. With reference to the circumstances of the offense the court wrote: "This is not a case, for example, in which an exhibitionist forced himself on large numbers of the public by cavorting naked on a busy street at high noon. Instead, a very different picture emerges." *Id.*

76. After discussing the events which led to Lynch's arrest the opinion notes that, "We recite these facts simply to illustrate the vast disproportion between the conduct of which petitioner was convicted and the punishment he has suffered—and still faces. The fault does not lie in the theory of indeterminate sentence law, but in the unreasonably high maximum term prescribed for this offense." *Id.* at 438, 503 P.2d at 940, 105 Cal. Rptr. at 236.

77. *People v. Tanner*, 3 Cal. 2d 279, 298, 44 P.2d 324, 333 (1935); *People v. Keller*, 245 Cal. App. 2d 711, 715, 54 Cal. Rptr. 154, 157 (1966). Both cases quote *Bailey v. United States*: "Where the sentence imposed is within the limits prescribed by the statute for the offense committed, it ordinarily will not be regarded as cruel and unusual." 74 F.2d 451, 453 (10th Cir. 1934) (emphasis added). See *In re Finley*, 1 Cal. App. 198, 201-02, 81 P.2d 1041, 1042-43 (1905).

78. E.g., *People v. Sheridan*, 271 Cal. App. 2d 429, 431, 76 Cal. Rptr. 655, 656 (1969).

that there are some behaviors, classified as crimes for which *any* criminal punishment would be cruel and unusual. The leading case on this issue is *Robinson v. California*<sup>79</sup> which struck down a state statute making narcotics addiction a misdemeanor punishable by imprisonment.<sup>80</sup> The specific holding of the case invalidated status offenses, but some have advocated a broader interpretation to support the judicial questioning of whether a given act should be treated criminally at all.<sup>81</sup> Appeals based on this view contend that if the status of addiction, for example, cannot be made criminal, then neither should those acts which are the natural concomitants of the status such as drug purchase or possession. Advocates of this view would extrapolate from the *Lynch* decision and argue that in *Lynch* indecent exposure was placed on a par with fairly venial crimes rather than with those serious offenses which are punished by life imprisonment. The court then held that if a crime is minor it is cruel and unusual to punish it with a severe sentence. The argument continues that in addiction cases acts related to the status are more comparable to symptoms of an illness than to criminal behavior. Drawing the analogy to *Lynch*, then, the contention is that any penal treatment of these symptoms constitutes cruelty and should be constitutionally proscribed.

### *Status or Behavior*

In *Robinson* the Court ruled that incarceration for a status offense was cruel and unusual since under such a law a defendant might be convicted not for any illegal act but merely on the basis of an attribute for which he might be prosecuted at "any time before he reforms."<sup>82</sup> The effect of the ruling is that the state can no longer make nonvolitional conduct criminal; that is, it may not punish a person merely on the basis of a characteristic or condition.<sup>83</sup> The rationale behind the decision appears to be consonant with H. L. A. Hart's view that "[i]n a civilized [legal] system only those who *could have* kept the law should be punished . . . the individual has a right not to be [punished] unless he could have avoided doing what he did."<sup>84</sup>

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79. 370 U.S. 660 (1962).

80. Cal. Stat. 1957, ch. 1064, § 1, at 2343 (repealed 1972).

81. See notes 90-101 and accompanying text *infra*.

82. 370 U.S. 660, 666 (1962).

83. Neibel, *Implications of Robinson v. California*, 1 HOUST. L. REV. 1, 9 (1963) [hereinafter cited as Neibel].

84. 1 H.L.A. HART, *THE MORALITY OF THE CRIMINAL LAW* 8, 27 (1965) (emphasis in original). This position is a far cry from that taken by H. Barnes in 1926: "As the criminal, in nearly every case, is defective in one way or another, it is necessary to take positive remedial action with the aim either of eliminating his defects or rendering those defects no longer a danger to society. . . . A certain number of convicts will be revealed at once upon examination to be a type that should never, under

The *Robinson* opinion discusses at length the nonvolitional character of status offenses, pointing out that addiction can occur from medical treatments and may even be contracted *in utero* by infants of addicted mothers.<sup>85</sup> The Court found that under the California law an individual could be guilty of a crime even though he had committed no illegal act. Such a law is inimical to the Constitution.<sup>86</sup> While the opinion does not question that interest which the state has in regulating drug traffic or its power to do so for the protection of public health and welfare,<sup>87</sup> it does indicate that this regulation may be pursued through numerous channels, the criminal area being only one.<sup>88</sup>

For the most part the status aspect of the *Robinson* ruling has been relied upon in cases of prosecution for drug and alcohol addiction.<sup>89</sup> It has been asserted, however, that there are other acts, currently criminal, which are merely "symptoms" of a condition and that the punishment of the symptom is as unconstitutional as the castigation of the status. Thus there are some difficulties in ascertaining how far the principle should be extended.<sup>90</sup> J. B. Neibel has argued that the injunction should be amplified to include acts *relating* to addiction.

To treat the acts of obtaining, using or possessing, or being under the influence of narcotics as compulsive and non-volitional, and thus to justify treating him as a sick person and not as a criminal, would be analogous to the treatment of the acts of an insane person. . . .

. . . The repetitive acts of a drug addict are not volitional. Therefore they should not be punishable by imprisonment. . . . [O]nce established, addiction is not a crime of the will; rather, for the addict, it has become a condition of existence.<sup>91</sup>

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any circumstances, be again restored to a life of freedom, but should be permanently segregated or painlessly exterminated. Feeble-minded criminals, parietic criminals, and other types of low-grade degenerates or incurables would make up the bulk of this class." THE REPRESSION OF CRIME 31.

85. 370 U.S. at 667 n.9; *id.* at 670 (Douglas, J., concurring).

86. *Id.* at 666.

87. *Id.* at 664. This discussion will deal only with drug and alcohol addiction and related activities. For a consideration of so-called "victimless crimes" such as gambling, homosexuality, prostitution and other sexual behavior between consenting adults, see Note, *Victimless Sex Crimes: To the Devil, Not the Dungeon*, 25 U. FLA. L. REV. 139 (1972).

88. 370 U.S. at 664-65.

89. See notes 92-101 and accompanying text *infra*.

90. A consideration of the role of drug or alcohol intoxication in the defense of more serious crimes like robbery or homicide is beyond the scope of this note. For a discussion of this broader topic see Haddad, *The Mental Attitude Requirement in Criminal Law—And Some Exceptions*, 59 J. CRIM. L.C. & P.S. 4 (1968); Lieb, *Cruel and Unusual Punishment and the Durham Rule*, 59 J. CRIM. L.C. & P.S. 227, 231-34 (1968) [hereinafter cited as Lieb]; Lunter, *The Effect of Drug-Induced Intoxication on the Issue of Criminal Responsibility*, 8 CRIM. L. BULL. 731 (1972).

91. Neibel, *supra* note 83 at 7-8. See also Lieb, *supra* note 90; McMorris, *Can*



In several cases, *Robinson* was successfully relied upon in defense of chronic alcoholics who became intoxicated or committed illegal acts while in that condition. In *Easter v. District of Columbia*<sup>92</sup> the court ruled that "a sick person who has lost control over his use of alcoholic beverages" could not have formed the requisite mens rea to commit a violation of the public drunkenness law.<sup>93</sup> Following this line of thought the issue shifts from whether the defendant's *status* is volitional to whether his *actions* are freely chosen. The argument runs that if the defendant has lost his ability to choose through addiction he cannot form the mens rea required for criminal culpability and ought not to be punished. Clearly this view greatly expands the *Robinson* ruling. A number of writers hailed the *Easter* decision as a benchmark which would allow a defense of incapacity based on both the *Robinson* view of status crimes and an interpretation of cruel and unusual punishment similar to that used in *Lynch*.<sup>94</sup> Generally, however, this prophetic interpretation has not been realized and appeals on this basis have proven unsuccessful.

The major case to arrest the development of this theory was *Powell v. Texas*<sup>95</sup> in which the United States Supreme Court resisted the extension of *Robinson* and re-emphasized the distinction between status and act:

On its face the present case does not fall within that holding [of *Robinson*] since appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status. . . . Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community. This seems a far cry from convicting one for being an addict, being a chronic alcoholic, being "mentally ill, or a leper. . . ."<sup>96</sup>

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*We Punish for the Acts of Addictions?*, 54 A.B.A.J. 1081 (1968); Note, *Control and Treatment of Narcotic Addicts: Civil Commitment in California*, 6 SAN DIEGO L. REV. 35 (1969); Note, *Punishment of a Narcotic Addict for Crime of Possession: Eighth Amendment Implications*, 2 VALPARAISO U.L. REV. 316 (1968).

92. 361 F.2d 50 (D.C. Cir. 1966).

93. *Id.* at 53; accord, *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966); *People v. Davis*, 27 Ill. 2d at 57, 188 N.E.2d 225 (1963).

94. See Marden & Silverstein, *The Growing Importance of Criminal Law to the Legal Profession*, 53 A.B.A.J. 511, 514 (1967); Logan, *May a Man Be Punished Because He is Ill?*, 52 A.B.A.J. 932 (1966); Note, *Constitutional Law—Eighth Amendment: Cruel and Unusual Punishment; A Vehicle for Reappraising the Application of the Criminal Law to the Individual*, 40 CONN. B.J. 521 (1966); Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966).

95. 392 U.S. 514 (1968). See also *Rakes v. Coleman*, 359 F. Supp. 370, 379 (E.D. Va. 1973).

96. 392 U.S. at 532 (citation omitted).

*Powell* was followed by *Watson v. United States*<sup>97</sup> in which the defendant relied on the *Easter* precedent as a defense to a charge of possessing narcotics contending that as an addict he was compelled to use drugs and this necessitated possessing them. He cited *Robinson* and *Easter* as supporting his claim that prosecution for possession was equivalent to prosecution for his status as an addict. In light of the *Powell* decision, however, the same court which established the *Easter* rule declined to expand the principle further and so upheld appellant's conviction for possession.<sup>98</sup>

California courts have specifically rejected the *Easter* ruling and have adopted a restrictive view similar to that taken in *Powell*.<sup>99</sup> The view of the state judiciary is summarized by the court in *People v. Omori*:<sup>100</sup>

Legally appellant's claim [that it is cruel and unusual to punish an addict for possession] is without merit for he was convicted not because of his status as an addict or because of his condition of addiction, but for his criminal act. . . . [*Robinson*] placed no restriction on the right of the states to regulate the narcotics drug traffic within their borders, impose criminal sanctions for the unauthorized manufacture, prescription, sale, purchase or possession of narcotics or establish a program of compulsory treatment for those addicted.

. . . We are not willing to extend the *Robinson* doctrine to embrace compulsive addiction-induced activity such as use, possession or purchase of narcotics, clearly criminal in nature.<sup>101</sup>

At this point it appears that the courts are less anxious than the writers in the field to expand the *Robinson* holding beyond cases of status offenders, and the *Lynch* clarification of cruel and unusual punishment will probably have no effect on this judicial position.

### *Habitual Criminal Statutes*

Some writers have heralded *Robinson* as support for the abolition

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97. 439 F.2d 442 (D.C. Cir. 1970).

98. *Id.* at 451. Writing for the court in *Watson*, Judge McGowan indicated another avenue of defense in the case of an individual addict who possesses drugs only to support his own habit. He suggests that possession laws are aimed at drug sellers and that a "non-trafficking possessor" may contend that his situation was not intended by the legislature to fall under the possession laws. *Id.* at 452. See also *Chicquelo v. United States*, 452 F.2d 1310 (D.C. Cir. 1971); *Klienbart v. United States*, 439 F.2d 511 (D.C. Cir. 1970).

99. *E.g.*, *In re Spinks*, 253 Cal. App. 2d 748, 61 Cal. Rptr. 743 (1967).

100. 25 Cal. App. 3d 616, 102 Cal. Rptr. 64 (1972).

101. *Id.* at 618-19, 102 Cal. Rptr. at 65-66; *accord*, *People v. Harris*, 274 Cal. App. 2d 826, 79 Cal. Rptr. 352 (1969); *People v. Davis*, 240 Cal. App. 2d 496, 49 Cal. Rptr. 663 (1966); *People v. Schaletzke*, 239 Cal. App. 2d 881, 49 Cal. Rptr. 275 (1966); *People v. Lamb*, 230 Cal. App. 2d 65, 41 Cal. Rptr. 157 (1964); *People v. Zapata*, 220 Cal. App. 2d 903, 34 Cal. Rptr. 171 (1963).

of habitual criminal statutes.<sup>102</sup> While it appears that such provisions will withstand a "status" challenge,<sup>103</sup> the *Lynch* decision may provide another point of departure. One argument against recidivism laws is that they unfairly penalize convicts merely because of their status as multiple offenders. That the defendant's prior record and, therefore, his status are in issue cannot be questioned.<sup>104</sup> What is open to inquiry, however, is whether habitual criminal provisions are aimed at more than simple criminalization of status. The problem raises another aspect of the status/behavior issue.

Modern habitual criminal laws seem to have arisen in England in the late 1800's following the report of the Gladstone Committee.<sup>105</sup> In its presentation the committee cited rehabilitation as the goal of a correctional system and it felt that an increased deprivation of liberty would deter repetition. But should deterrence fail, the committee noted that greater penalties would at least protect society by isolating offenders for longer periods.<sup>106</sup> The reasoning of the committee seems questionable on two points, however. First it is not immediately evident how incarcerating a man for a longer period will effectuate rehabilitation when the convict is being imprisoned in the same system that failed to resocialize him initially.<sup>107</sup> Secondly, opponents of the statutes contend that if they effectively deter further criminal behavior at all it is only when they are applied to minor crimes. The reasoning is that for truly serious offenses the penalties are already quite lengthy and thus need not be augmented by recidivistic provisions to discourage offenders. The statutes only become effective when imposed to lengthen terms for offenses which, in their own right, are not considered sufficiently serious to merit an extended sentence.<sup>108</sup>

Despite these arguments courts have been consistent in their refusal to overturn habitual criminal statutes *per se*,<sup>109</sup> distinguishing be-

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102. Broeder & Merson, *Robinson v. California: An Abbreviated Study*, 3 AM. CRIM. L.Q. 203 (1965); Neibel, *supra* note 83; Cuomo, *supra* note 1.

103. See notes 109 & 111 *infra*.

104. The court in *People v. Richardson* explained, "Allegations of previous convictions, and that an accused is an habitual criminal, are not allegations of a substantive crime, but are a status . . . ." 74 Cal. App. 2d 528, 542-43, 169 P.2d 44, 54 (1946).

105. House of Commons, Report of the Committee on Prisons (1895). Recidivism provisions were not necessary before this period since, previously, offenses of any consequence whatever were capital. Note, *Recidivism: The Treatment of the Habitual Offender*, 7 U. RICH. L. REV. 525 (1973) [hereinafter cited as *Recidivism*].

106. *Recidivism*, *supra* note 105, at 526. See also *People v. Richardson*, 74 Cal. App. 2d 528, 169 P.2d 44 (1946).

107. *Recidivism*, *supra* note 105, at 527.

108. See *id.* at 526-27; Katkin, *Habitual Offender Laws: A Reconsideration*, 21 BUFFALO L. REV. 99, 106 (1971) [hereinafter cited as Katkin].

109. E.g., *Graham v. West Virginia*, 224 U.S. 616 (1912); *McDonald v. Massachusetts*, 180 U.S. 311 (1901); *People v. McDaniels*, 165 Cal. App. 2d 283, 331 P.2d

tween true status crimes and habitual criminal provisions. In the former classification the "offender" has a characteristic, which may or may not have been volitionally acquired, and upon which the law imposes a punishment, while in the case of habitual criminal or recidivism statutes, the offender has actually committed a crime, and having done so the law regards this act as more serious in the light of his prior convictions and consequently deserving of greater penalty. The offender is not punished for his status alone. He only comes into the penal system after his commission of an illegal act; only after willfully breaking the law again does he become eligible for an exacerbated penalty. There is a valid distinction to be made between penalizing an individual solely for his personal characteristics and dealing more harshly with him upon his repetition of criminal behavior.<sup>110</sup> Decisions indicate that society has a legitimate interest in self-protection and that laws of this nature are permissible tools in pursuance of that interest.<sup>111</sup> One commentator has contended that the enactment of recidivism provisions is unsound public policy since they serve only to isolate "unfortunate inadequates."<sup>112</sup> Even if this criticism is well founded, the argument is more appropriately advanced in the legislative chamber than in the courtroom.

There is one ground, however, on which habitual criminal provisions are vulnerable to attack and that is on the issue of their proportionality. *Lynch* has established that penalties must bear some reasonable relationship to the crime and if sentences do not meet this test they must fail as cruel and unusual. It has been argued that, "one of the most striking characteristics of habitual offender laws is that they mandate or permit the imposition of sentences the severity of which is out of all proportion to the specific offense which 'triggers' them."<sup>113</sup> In *In re Boatwright*,<sup>114</sup> for example, the defendant's offense was the theft of a twenty-five dollar automobile tire, but since he had four prior convictions he was sentenced to life imprisonment

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450 (1958); *In re Boatwright*, 119 Cal. App. 420, 6 P.2d 972 (1931); see Annot., 33 A.L.R.3d 335, 371 n.11 (1970); *Recidivism*, *supra* note 105, at 531-33. For an historical consideration of the constitutionality of habitual criminal statutes, see Note, *Recidivism and Virginia's "Come-back" Law*, 48 VA. L. REV. 597, 602-07 (1962).

110. See Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203, 1205 (1953). The rationale for different classifications of offenders was considered in *In re Finley*, 1 Cal. App. 198, 205-09, 81 P. 1041, 1044-46 (1904), and the *Lynch* court ruled that incremental sentencing of repeat offenders is acceptable as long as the increase is proportionate to the gravity of the offense and its repetition. 8 Cal. 3d at 434-36, 503 P.2d at 937-38, 105 Cal. Rptr. at 233-34.

111. See, e.g., *Spencer v. Texas*, 385 U.S. 554 (1967); *Oyler v. Boles*, 368 U.S. 448 (1962).

112. Katkin, *supra* note 108, at 108.

113. *Id.* at 117.

114. 119 Cal. App. 420, 6 P.2d 972 (1931).

without possibility of parole. The California Supreme Court approved that penalty in 1931.<sup>115</sup> In light of the *Lynch* decision it appears that a challenge to such a penalty would be on much stronger ground today.<sup>116</sup> The *Lynch* opinion indicates that even penalties which are increased because of recidivism must be in proportion to the offense. The court quoted with approval the view of the American Bar Association's Advisory Committee of Sentencing and Review: "Any increased term which can be imposed because of prior criminality should be related in severity to the sentence otherwise provided for the new offense."<sup>117</sup> While the court implies that it is the legislature's prerogative to decide how to deal with repeat offenders, it also establishes the role of the judiciary in ensuring legislative consistency.<sup>118</sup> While additional case law will clarify the issue the basic position is evident. Increased penalties for recidivism are also subject to challenge on the basis of the *Lynch* precedent. Habitual criminal statutes which fail to meet the proportionality standards will be considered cruel and unusual.

### Conclusion

With its decision in *In re Lynch* the California Supreme Court has, for the first time, declared a punishment cruel and unusual for being disproportionate to the offense for which it was imposed. Thus the ruling has provided a new foundation for habeas corpus appeals which seek to challenge unduly harsh penalties. While *Lynch* may have jarred the prison door, however, it should not be viewed as having flung it open since other case law indicates limitations on the *Lynch* holding. Generally attacks on sentences will have a greater chance of success if they maintain that the law itself is unconstitutional under any circumstances rather than contending that the law as applied to a specific appellant is unduly severe. Further, although *Lynch* speaks in terms of proportionality, it appears that the courts will not accept the argument that for some acts *any* punishment is cruel and unusual. State judges have repeatedly ruled that the selection of behavior to be treated criminally is a legislative function while the court's role is to ensure that sentences imposed by the legislature reflect the severity of the crime. Finally, habitual criminal provisions, while not directly

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115. In a subsequent petition for habeas corpus the court ruled that the legislature did not intend the imposition of the greater sentence. *In re Boatwright*, 216 Cal. 677, 15 P.2d 755 (1932).

116. Cf. Annot., 33 A.L.R.3d 335, 348 (1970).

117. 8 Cal. 3d 410, 435, 503 P.2d 921, 938, 105 Cal. Rptr. 217, 234 (1972).

118. "The theory in each instance is that whatever the response appropriate to the factor of recidivism, the judgment of the Legislature as to the gravity of the act itself should remain relatively constant." *Id.* at 435, 503 P.2d at 937-38, 105 Cal. Rptr. at 233-34.

undermined by the *Lynch* decision, are made subject to its criteria and will not be permitted to exacerbate penalties beyond all proportion to the defendant's present offense. The *Lynch* opinion is a significant departure in that it exposes a new facet of California's constitutional proscription against cruel and unusual punishments. Asserted within the boundaries erected by other case law, the *Lynch* precedent should provide an effective tool in preventing the imposition of unreasonably excessive sentences.

*Carol A. Corrigan\**

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\* Member, Second Year Class.